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In the Supreme Court of the United States

OCTOBER TERM, 1969.

No. 394

CHARLIE DELIA,
Petitioner,

vs.

COURT OF COMMON PLEAS OF CUYAHOGA COUNTY,
and
SHAKER AIR CONDITIONING CO.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

EMANUEL M. ROSE,
940 Leader Building,
Cleveland, Ohio 44114,

ALAN M. WOLK,
628 Keith Building,
Cleveland, Ohio 44115,

EDWIN F. WOODLE,
628 Keith Building,
Cleveland, Ohio 44115,
Attorneys for Petitioner.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

TABLE OF CONTENTS.

Opinions ---------- 1

Jurisdiction ---------- 2

Questions Presented ---------- 2

The Constitutional Provision Involved ---------- 3

Statement of the Case ---------- 3

Reasons for Granting a Writ ---------- 7

1. Both the due process mandate and the equal protection mandate of the Fourteenth Amendment require the judicial department of the state, no less than it does the executive and the legislative departments, to accord to each litigant the equal protection of the law by assuring him the right to a determination of his case in accordance with the established and undisputed law of the state applicable thereto -- 7

2. This Court has never declared that under no circumstances can a litigant claim and establish a deprivation of due process of law and of the equal protection of the law resulting from the substantive action of a state court. The deliberate refusal of the state court to follow undisputed state law defining the necessary elements of a cause of action, as set forth in the complaint herein, affirms a consequent deprivation of constitutional rights with respect to which the plaintiff is entitled to a trial ---- 13

Conclusion ---------- 19

Appendix:

Opinion of the United States District Court for the Northern District of Ohio, Eastern Division 21

Opinion of District Court on Motion for Reconsideration ---------- 24

Opinion and Order of the United States Court of Appeals for the Sixth Circuit ---------- 25

TABLE OF AUTHORITIES.

Cases.

American Express Co. vs. Commonwealth of Kentucky, 273 U.S. 269; 47 Supr. Ct. 353; *Pennoyer vs. Neff*, 95 U.S. 714 ---------- 20

American Railway Express Co. vs. Commonwealth of Kentucky, 273 U.S. 269; 47 Supr. Ct. 353 ----------12, 14, 20

Beck vs. Washington, 369 U.S. 541; 82 Supr. Ct. 955 18

Brinkerhoff-Faris Trust & Savings Co. vs. Hill, 281 U.S. 673; 50 Supr. Ct. 451 ---------- 11

Chicago Life Insurance Co. vs. Cherry, 244 U.S. 25; 37 Supr. Ct. 492 ---------- 14

Corrigan vs. Buckley, 271 U.S. 323; 46 Supr. Ct. 521 14

Dykeman vs. Johnson, 88 O.S. 126; 93 N.E. 626 (1910) ---------- 6

England vs. Louisiana State Board of Medical Examiners, 375 U.S. 411; 84 Supr. Ct. 461 ---------- 17

Fish, J. T., & Co. vs. States Coal Co., 70 O.L.A. 585; 129 N.E. (2d) 657 (1954) ---------- 6

McGovern vs. City of New York, 229 U.S. 363; 33 Supr. Ct. 876 ---------- 13

Milwaukee Electric Railway and Light Co. vs. State of Wisconsin ex rel. City of Milwaukee, 252 U.S. 100; 40 Supr. Ct. 306; 10 A.L.R. 892 ---------- 10

Schroeder vs. City of New York, 371 U.S. 208; 83 Supr. Ct. 279 ---------- 19

Snowden vs. Hughes, 321 U.S. 1; 64 Supr. Ct. 397 -- 14

Speiser vs. Randall, 357 U.S. 513; 78 Supr. Ct. 1332 18

Townsend vs. Sain, 372 U.S. 293; 83 Supr. Ct. 745 -- 16

Constitution and Statutes.

Constitution of the United States, Fourteenth Amendment ---------- 2, 3, 7, 9, 15, 17, 18, 19

Ohio Revised Code, Sec. 1335.05 ---------- 7

28 U.S.C. 1254(1) ---------- 2

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For the Sixth Circuit.

Petitioner, Charlie Delia, asks that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit made and entered on the 2nd day of May, 1969 (Appendix, p. 25) affirming the judgment of the United States District Court for the Northern District of Ohio, Eastern Division.

OPINIONS.

Two Memorandum Opinions were written by the United States District Court (Appendix p. 21, and p. 24). A Memorandum Opinion was incorporated in the Order of the United States Court of Appeals (Appendix, p. 25).

JURISDICTION.

The final judgment of the United States Court of Appeals for the Sixth Circuit was entered on May 2, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1). Petitioner claims that there was error in the judgment of said Court of Appeals and that his rights were violated contrary to the Due Process Clause and to the Equal Protection Clause of Amendment Fourteen of the Constitution of the United States.

QUESTIONS PRESENTED.

1. Does the equal protection mandate of the Fourteenth Amendment, addressed to the States, afford less effective, and less extensive, protection to the citizens of the United States from the consequences of the conduct of the judicial department, than from the consequences of the conduct of the executive and of the legislative departments?

The petitioner contends that this question should be answered in the negative.

2. In their appearance as litigants, may all citizens of the United States require that State Courts apply to the determination of the causes presented the undisputed and established law of the State?

The petitioner contends that this question should be answered in the affirmative.

3. Does the refusal of a State Court to apply to any cause the established and undisputed applicable law of the State, theretofore as well as thereafter in effect, constitute a denial of due process of law and of the equal protection of the law in violation of the mandate of the Fourteenth Amendment?

The petitioner contends that this question should be answered in the affirmative.

4. In the absence of an affirmative assertion by a State Court that its judgment, rendered contrary to, and in disregard of, the established and undisputed applicable State law, was the result of ignorance or negligence upon the part of the Court, is there a presumption that the Court's conduct in so acting was an intentional deprivation of the rights of the litigant adversely affected thereby?

The petitioner contends that this question should be answered in the affirmative.

5. When all of the foregoing is made to appear in a complaint seeking appropriate federal remedy and relief, should the complainant be denied such relief without trial because the complaint fails to portray the state of mind of the State Court judge or to allege the existence of an evil or malicious intent?

The petitioner contends that the answer to this question should be in the negative.

THE CONSTITUTIONAL PROVISION INVOLVED.

Amendment Fourteen to the Constitution of the United States, as pertinent hereto, provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE.

The complainant seeks a declaratory judgment finding and determining that a judgment of the defendant Court "was rendered as the result of the deprivation to the plaintiff of the equal protection of the laws, and that by reason thereof said judgment should be, and is declared

to be, of no force and effect and is vacated and set aside." The defendant Company was the successful litigant in the judgment rendered by the defendant Court.

The District Court granted separate Motions to Dismiss the complaint for the asserted reason that it fails to state a claim upon which relief can be granted. The District Court's reasons were set forth in a Memorandum Opinion (Appendix, p. 21). Upon reconsideration the original ruling of the District Court was adhered to, this time for different reasons set forth in a short Memorandum Opinion (Appendix, p. 24).

The facts of this case are accordingly found in the essential allegations of the complaint, which, for purposes of review here, are necessarily considered to be true. The essential allegations of the complaint include the fact that the defendant Company sued the plaintiff in the defendant Court, wherein, after trial, the Court rendered judgment in favor of the Company. The complaint alleges:

> "The elements of a cause of action such as that filed and presented by the defendant Company * * * and the elements and facts required to be proved upon the trial of such an action, are long and well established under the law of Ohio.
>
> "Upon the trial of the aforesaid action the defendant Company made no attempt, offer or proffer to prove any of the elements of the cause of action against this plaintiff required to be proved by it.
>
> "The defendant Court acted, and purported to act, under color of, and pursuant to, the provisions of the Constitution and applicable statutes of the State of Ohio.
>
> "The defendant Court was bound and required to apply to the action instituted by the defendant Company against this plaintiff the established and undisputed law of the State of Ohio, and was bound and required to render in favor of the defendant Com-

pany no judgment against this plaintiff unless and until said defendant Company had made proof of all of the elements of its cause of action."

"Contrary to and in violation of the duty imposed upon the defendant Court by the provisions of the Fourteenth Amendment to the Constitution of the United States, said Court failed and neglected to require of the defendant Company proof of any and all of the elements of the cause of action which said defendant purported to present for trial and determination * * *. In so doing, the defendant Court failed to accord to this plaintiff the equal protection of the laws of the State of Ohio, but on the contrary denied to this plaintiff the equal protection of the laws."

The complaint further alleges that upon appeal to the Court of Appeals of the Eighth Appellate District of Ohio the plaintiff assigned as error the refusal of the Trial Court to follow the established law of the State of Ohio, and that the defendant Company filed no Brief and prepared no argument in writing in opposition to such claims of error. The complaint alleges that notwithstanding this fact the judgment of the Trial Court was affirmed without opinion.

The complaint further alleges that thereafter the Supreme Court of Ohio denied a Motion filed with that Court to certify the record in the cause upon the ground that the issues presented were not of public or great general interest. The Supreme Court found and determined that it had no jurisdiction of the cause.

The complaint alleges that the plaintiff has exhausted all remedies available to him under the Constitution and laws of the State of Ohio. The complaint also amplifies the allegations quoted therefrom, and above set forth, by describing in detail the nature of the cause of action of the defendant Company, the nature of the undisputed and established elements of that cause of action under the law

of Ohio, and the failure of the defendant Court to require proof of any of such established elements.

In its action the defendant Company sought to hold the plaintiff personally liable for obligations incurred over a considerable period of time by the corporation of which the plaintiff was the president. That corporation and the defendant Company had engaged in business for many years. The attempt on the part of the defendant Company to hold the plaintiff personally liable was undertaken because of the bankruptcy of the corporation. All transactions between the two companies originated and were carried on in precisely the same manner both prior to those transactions claimed to be the personal liability of the president and those which took place thereafter.

The defendant Company filed suit in the form of an action on an account. This is a special form of action authorized by statute in Ohio. The statute, however, relates only to the form of pleading.

On the trial of the case, the defendant Company rested its right to recover upon its own book records. It produced a series of connected ledger cards which originally bore the name of the corporation of which the plaintiff was president. Subsequently the defendant Company inserted on the same ledger card the name of the plaintiff as the one with whom it was purportedly doing business.

The undisputed law of Ohio requires that in such circumstances the plaintiff must prove the terms of its contract, or contracts, with the defendant and must prove that it fully performed the terms of such contract, or contracts, before it can recover. This has been the law of Ohio for fifty years and it has never changed. See *Dykeman vs. Johnson,* 88 O.S. 126; 93 N.E. 626 (1910) and *J. T. Fish & Co. vs. States Coal Co.,* 70 O.L.A. 585; 129 N.E. (2d) 657 (1954) as examples.

The defendant Company made no attempt to offer any proof whatever of any contract with the plaintiff or of the terms of any contract with the plaintiff; attempted to offer no proof whatever of performance on its part of any one or more of the series of numerous contracts making up its "account." In fact, the defendant Company offered no evidence whatever to prove the furnishing of any consideration for its claims against the plaintiff, nor to satisfy the Ohio Statute of Frauds (Ohio Revised Code, § 1335.05) which requires that a promise to answer for the debt of another is required to be in writing and signed by the person to be charged. The business records of the defendant Company were, of course, in more than one sense, completely self-serving in this situation.

No Court giving consideration to this case offered any explanation or comment for the deliberate refusal to follow the undisputed requirements of the law which had been established for almost fifty years.

REASONS FOR GRANTING A WRIT.

No. 1. Both the due process mandate and the equal protection mandate of the Fourteenth Amendment require the judicial department of the state, no less than it does the executive and the legislative departments, to accord to each litigant the equal protection of the law by assuring him the right to a determination of his case in accordance with the established and undisputed law of the state applicable thereto.

The basic issue in this case involves the nature of the right which any litigant before a State Court may insist upon as a right guaranteed him by the Fourteenth Amendment to the United States Constitution.

The complaint alleges in effect that every litigant in a State Court is very simply and basically entitled to a de-

termination of his case in accordance with the established and undisputed applicable law of the State. No issue is presented in this case that the applicable law of the State of Ohio, and the applicable legal principles established under the law of the State of Ohio, are in dispute.

There is no issue in this case that the applicable law and the established legal principles involved were changed or modified in this case either by the Trial Court or by any court having the authority to modify that law. There is no question in this case that the applicable law of the State of Ohio and the applicable legal principles are precisely the same now, and remain precisely the same subsequent to the State Court's determination of the plaintiff's case as at that time and prior thereto.

The case made by the plaintiff's complaint is clear and simple. The plaintiff was sued in the defendant Court by the defendant Company. The defendant Company claimed before the defendant Court the existence of a liability to it by the plaintiff herein. The plaintiff herein denied the existence of any such liability. The plaintiff went before the defendant Court relying upon the fact that there was well established and undisputed law applying to his case which that Court was bound to employ.

The plaintiff went before the defendant Court knowing that the established and undisputed law of the State of Ohio required the defendant Company to prove the existence of certain facts before it could recover a judgment. The defendant Company made no attempt to prove any of those facts. The defendant Court refused to require the defendant Company to do so.

Admittedly, in the present state of the case before this Court, the defendant Court simply refused to follow the undisputed and established law of the State of Ohio. Under such circumstances, the question may be very simply put:

Did the plaintiff in this case go before the defendant Court expecting that he was entitled to insist upon a right guaranteed to him by the Due Process Clause and by the Equal Protection Clause of the Fourteenth Amendment, when in fact the mandate of that Amendment guaranteed him no such right whatever?

To state the question in other words, is any litigant before any State Court in any case wherein the law of the State applicable thereto is established and undisputed, entitled to have his case determined in accordance with that law? The United States Court of Appeals for the Sixth Circuit considered that the answer to this question was so apparent, and that the claim of the plaintiff herein to the protection accorded him under the Fourteenth Amendment was so unsubstantial, as to require no serious consideration whatever. Accordingly, the Circuit Court declined even to grant to the plaintiff the customary privilege of oral argument. Instead, it summarily affirmed the judgment of the District Court.

In so doing the Circuit Court advanced as a basis for its ruling (Order, Appendix, pp. 25-26):

> "Unequal application of a state law fair on its face is not a denial of equal protection unless there is shown to be present an element of intentional or purposeful discrimination. Snowden vs. Hughes, 321 U.S. 1. Mere errors and irregularities occurring in a judicial proceeding are to be differentiated from a situation where the proceeding itself is a sham or nullity. * * * If it should be assumed that the Ohio courts did not correctly apply the law of Ohio to appellant's case, there is nevertheless a lack of any allegations in the complaint tending to show a purposeful discrimination. Certainly, a construction of the Equal Protection Clause is not favored which would in effect allow a Federal court to relitigate a State court case upon every alleged departure from state law by state officers."

With due respect to the opinion of the Circuit Court, the plaintiff asserts that the Circuit Court wholly failed to comprehend the issue raised by the complaint. In raising this issue the plaintiff has given full weight to the numerous decisions and opinions of this Court which have plainly indicated that it is neither the duty nor the function of this Court to review errors in State Court judgments or proceedings.

The plaintiff has also accorded full weight to the several decisions and opinions of this Court which have indicated that mere errors or irregularities in the proceedings and judgments of a State Court do not under ordinary circumstances constitute a denial of due process of law or of the equal protection of the law.

It is submitted that the case at bar does not come within, and is not controlled by, those decisions. On the contrary, this case reaches and exceeds that point of differentiation to which this Court has alluded in previous opinions and rises to the level of a federal constitutional question of substance and importance.

A few examples may suffice to illustrate the difference in the issue here raised. In the case of *Milwaukee Electric Railway and Light Co. vs. State of Wisconsin ex rel. City of Milwaukee*, 252 U.S. 100; 40 Supr. Ct. 306; 10 A.L.R. 892, this Court said:

> "The company also insists that the ordinance is void because it denies equal protection of the laws. The contention rests upon the fact that, since entry of the judgment below, the Supreme Court of the State has decided Superior vs. Duluth Street R. Co., 166 Wisc. 487, which the company alleges is not reconcilable with its decision in this case. * * * But, however that may be, the Fourteenth Amendment does not, in guaranteeing equal protection of the laws, assure uniformity of judicial decisions any more than, in guar-

anteeing due process, it assures immunity from judicial error."

To differentiate, in the case at bar there never was, and never has been, any change in the applicable Ohio law and decisions. No new or different applicable principles ever were or have been announced.

In the case of *Brinkerhoff-Faris Trust & Savings Co. vs. Hill,* 281 U.S. 673; 50 Supr. Ct. 451, there appears a characteristic statement of the view of this Court as applied to issues involved in prior cases coming before it. In the opinion written by Mr. Justice Brandeis, this Court said:

> "It is true that the courts of the state have the supreme power to interpret and declare the written and unwritten laws of the state; that this Court's power to review decisions of state courts is limited to their decisions on federal questions and that the mere fact that a State Court has rendered an erroneous decision on a question of state law, or has overruled principles or doctrines established by previous decisions on which a party relied, does not give rise to a claim under the Fourteenth Amendment or otherwise confer appellate jurisdiction on this Court. * * *"

And in a footnote appended to that opinion it was stated:

> "The process of trial and error, of change of decision in order to conform with changing ideas and conditions, is traditional with courts administering the common law. Since it is for the State Courts to interpret and declare the law of the state, it is for them to correct their errors and declare what the law has been as well as what it is. State Courts, like this Court, may ordinarily overrule their own decisions without offending constitutional guarantees, even though parties may have acted to their prejudice on the faith of the earlier decisions."

Again, to differentiate, the plaintiff in this case has not charged simply the rendering of "an erroneous decision on a question of State law." The plaintiff has not alleged the overruling of any principle or doctrine established by previous State decisions. No such change has taken place.

Another characteristic statement of the view of this Court with respect to issues raised in previous cases coming before it is found in the case of *American Railway Express Co. vs. Commonwealth of Kentucky*, 273 U.S. 269; 47 Supr. Ct. 353. In its opinion in that case, the Court said:

> "Save under exceptional circumstances, not now present, we must accept as controlling the decisions of the state courts upon questions of local law, both statutory and common. 'The Due Process Clause does not take up the laws of the several states, and make all questions pertaining to them constitutional questions, nor does it enable this Court to revise the decisions of the State Courts upon questions of state law.' Enterprise Irrigation District vs. Farmers Mutual Canal Co., 243 U.S. 157, 165, 166. * * *"

The instant case is before this Court only upon the complaint of the plaintiff. On this status of the case this Court is not in a position to inquire into the record of the case before the State Court or to verify the circumstance that in fact no question of local law was decided by any court before which the plaintiff's State case was heard and determined. In the only Appellate Court which heard the plaintiff's case on the merits, counsel for the defendant Company filed neither a Brief nor any written Memorandum, and the Supreme Court of Ohio refused to admit or to consider the plaintiff's appeal upon the merits.

No. 2. This Court has never declared that under no circumstances can a litigant claim and establish a deprivation of due process of law and of the equal protection of the law resulting from the substantive action of a state court. The deliberate refusal of the state court to follow undisputed state law defining the necessary elements of a cause of action, as set forth in the complaint herein, affirms a consequent deprivation of constitutional rights with respect to which the plaintiff is entitled to a trial.

An examination of the Opinions of this Court dealing with alleged deprivation of constitutional rights based upon claimed errors and irregularities in State Court proceedings will disclose that at no time has this Court unequivocally barred the door to the presentation and consideration of such claims. After discussing prior descriptive definitions of due process, this Court said in the case of *McGovern vs. City of New York*, 229 U.S. 363 at page 373; 33 Supr. Ct. 876:

> "From the very nature of the problem, these phrases and others like them are approximate suggestions rather than scientific definitions. In last resort the line of division is dependent upon differences of degree too subtle to be catalogued. * * * One cannot hope to mark its bearings in a sentence or a paragraph.
>
> "Enough for present purposes that when the hearing has been full and candid, there must ordinarily be a showing of something more far-reaching than one of dubious mistake in the appraisal of the evidence. Due process is a growth too sturdy to succumb to the infection of the least ingredient of error. 'It takes more than a possible misconstruction by a court to make a case under the Fourteenth Amendment.' Seattle, Renton and Southern Railroad Co. vs. State of Washington ex rel. Linhoof, 231 U.S. 568, 570; 34 Supr. Ct. 185."

In the case of *Chicago Life Insurance Co. vs. Cherry,* 244 U.S. 25; 37 Supr. Ct. 492, this Court said in its opinion:

> "Whenever a wrong judgment is entered against a defendant and his property is taken when it should not have been, but whatever the ground may be, if the mistake is not so gross as to be impossible in a rational administration of justice, it is no more than the imperfection of man, not a denial of constitutional rights."

And in the case of *American Railway Express Co. vs. Commonwealth of Kentucky,* 273 U.S. 269; 47 Supr. Ct. 353 (*supra,* p. 12), this Court also said:

> "We cannot interfere unless the judgment amounts to mere arbitrary or capricious exercise of power, or is in clear conflict with those fundamental 'principles which have been established in our system of jurisprudence for the protection and enforcement of private rights.' Pennoyer vs. Neff, 95 U.S. 714, 733. Booth vs. Illinois, 184 U.S. 425, 429; 22 Supr. Ct. 425. Truax vs. Corrigan, 257 U.S. 312, 329; 42 Supr. Ct. 124; 22 A.L.R. 375."

Further, in the case of *Corrigan vs. Buckley,* 271 U.S. 323; 46 Supr. Ct. 521, this Court stated:

> "There is no semblance of ground for any contention that the decrees were so plainly arbitrary and contrary to law as to be acts of mere spoliation."

And in his concurring opinion in the case of *Snowden vs. Hughes,* 321 U.S. 1; 64 Supr. Ct. 397 at page 405 (the case cited as authority by the Court of Appeals), Justice Frankfurter stated the consequence of a hypothetical situation which is precisely the factual situation involved in the case at bar:

> *"And if the highest court of a state should candidly deny to one litigant a rule of law which it did con-*

cededly apply to all other litigants in similar situations, could it escape condemnation as an unjust discrimination and therefore a denial of equal protection of the laws?" (Emphasis supplied.)

From the foregoing quotations we sum up some of the situations in which a litigant may be found to have been deprived of the rights guaranteed by the Fourteenth Amendment as the result of substantive action upon the part of a State Court:

1. Where something "more than a possible misconstruction" of state law has taken place.

2. Where "the judgment amounts to mere arbitrary or capricious exercise of power," or "is in clear conflict with those fundamental principles which have been established in our system of jurisprudence for the protection and enforcement of private rights."

3. Where the judgments of the state courts "were so plainly arbitrary and contrary to law as to be acts of mere spoliation."

4. Where the state court did "candidly deny to one litigant a rule of law which it concededly did apply to all other litigants in similar situations."

Exhaustive research would undoubtedly reveal further and similar observations by this Court which must inevitably lead to the conclusion that the plaintiff herein, on the basis of the allegations of his complaint, was denied by the action of the Ohio Courts due process of law and the equal protection of the law.

The protection afforded within the past decade by decisions of this Court with respect to the personal liberty of the citizens of the United States has been noteworthy and extensive. Procedurally, many of the principles announced have been set forth in actions for writs of habeas

corpus. How many leagues behind the protection afforded to personal liberty shall the citizens of the United States find to be the protection afforded under the Constitution to their rights of property? In the case of *Townsend vs. Sain*, 372 U.S. 293 at page 315; 83 Supr. Ct. 745 at page 758, the following statements, dealing with a state criminal prosecution, are pertinent here:

Opinion:

"If the state court has decided the merits of the claim but has made no express findings, it may still be possible for the District Court to reconstruct the findings of the state trier of fact, either because his view of the facts is plain from his opinion or because of other indicia.

"In some cases this will be impossible, and the Federal District Court will be compelled to hold a hearing. * * * Since the decision of the state trier of fact may rest upon an error of law rather than an adverse determination of the facts, a hearing is compelled to ascertain the facts. * * *

"In any event, even if it is clear that the state trier of fact utilized the proper standard, a hearing is sometimes required if his decision presents a situation in which the 'so-called facts and their constitutional significance are so blended that they cannot be severed in consideration.' * * *

"Where the fundamental liberties of the person are claimed to have been infringed, we carefully scrutinize the state court record. * * * If the state trial judge has made serious procedural errors (respecting the claim pressed in federal habeas) in such things as the burden of proof, a federal hearing is required. * * *

"Our present concern is with errors which, although less serious, are nevertheless grave enough to deprive the state evidentiary hearing of its adequacy as a means of finally determining facts upon which constitutional rights depend."

These statements clearly demonstrate the length to which Federal Courts are required to go for the purpose of determining whether, in a criminal proceeding, the defendant's constitutional rights have been violated.

The Fourteenth Amendment speaks of "life, liberty and property" in the same phrase, in the same breath, and with the same emphasis. Granting that deprivation of liberty is undoubtedly more abhorrent, the quality of the Fourteenth Amendment guarantee to the citizens of the United States with reference to their property no less entreats the interest and the protection of this Court.

When, as in the case at bar, the complainant alleges that the State Court caused a judgment to be rendered against him, and is about to undertake to deprive him of his property in satisfaction of that judgment, *upon the basis of a trial wherein not a single element of the cause of action against him was required to be proved, or was proved,* an inquiry by the Federal Courts with respect to the deprivation of the plaintiff's constitutional rights is plainly solicited. It may be, however, that such an inquiry would not approach the depth or the complexity of that suggested by this Court in Townsend.

In the case of *England vs. Louisiana State Board of Medical Examiners,* 375 U.S. 411, 415; 84 Supr. Ct. 461, 464, this Court said:

> "There are fundamental objections to any conclusion that a litigant who has properly invoked the jurisdiction of a Federal District Court to consider federal constitutional claims can be compelled, without consent and through no fault of his own, to accept instead a state court's determination of those claims.
>
> "Such a result would be at war with the unqualified terms in which Congress, pursuant to constitutional authorization, has conferred specific categories of jurisdiction upon the federal courts, and with the

principle that 'When a federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction.' *Willcox vs. Consolidated Gas Co.*, 212 U.S. 19, 40; 29 Supr. Ct. 192, 195."

In presenting this Petition, plaintiff has not failed to take note of statements of this Court, as for example in the case of *Speiser vs. Randall*, 357 U.S. 513, 525; 78 Supr. Ct. 1332, 1342: "There is always in litigation a margin of error, representing error in fact finding, which both parties must take into account."

Nor has the plaintiff overlooked statements such as that in the case of *Beck vs. Washington*, 369 U.S. 541, 554; 82 Supr. Ct. 955, 962: "We have said time and again that the Fourteenth Amendment does not 'assure uniformity of judicial decisions or immunity from judicial error.' Were it otherwise, every alleged misapplication of state law would constitute a federal constitutional question."

This case, on the contrary, falls within the category of a judgment arising from the deliberate and intentional refusal of a State Court to require proof of the established and undisputed elements of a cause of action.

CONCLUSION.

This cause falls upon that side of a "line of division" which this Court has appropriately described as "dependent upon differences of degree too subtle to be catalogued." Of what value to a litigant is the carefully protected right with respect to notice of a hearing, enforced even in connection with administrative proceedings (*Schroeder vs. City of New York*, 371 U.S. 208; 83 Supr. Ct. 279); of what value is the carefully protected right of a litigant to appear at the trial of his cause, his carefully protected right to subpoena witnesses, his carefully protected right to cross-examine the witnesses against him, and of all of the other procedural safeguards affirmed by this Court, if upon the trial of his cause a State Court may with impunity adjudge against him, and thereby deprive him of his property, upon a deliberate refusal to require proof of any of the elements of the cause of action purportedly stated?

The entire galaxy of constitutionally protected procedural rights is deprived of any efficacy whatever if it is nothing more than a framework for the determination of a cause in wilful and utter disregard of the essentials of a cause of action. If, upon a deprivation of so fundamental a right, namely, the right to require a State Court to obey State law, the plaintiff is precluded from turning to the Federal Courts for relief, then no forum exists to enforce the guarantee of the Fourteenth Amendment that the plaintiff shall not be deprived of life, liberty *and property* without having been accorded due process of law and the equal protection thereof.

The conduct of the State Court in this case certainly amounted to a "mere arbitrary or capricious exercise of power" and was "in clear conflict with those fundamental principles which have been established in our system of

jurisprudence for the protection and enforcement of private rights." (*American Express Co. vs. Commonwealth of Kentucky*, 273 U.S. 269; 47 Supr. Ct. 353; *Pennoyer vs. Neff*, 95 U.S. 714, 753.)

Plaintiff prays that his Petition be granted.

Respectfully submitted,

EMANUEL M. ROSE,
940 Leader Building,
Cleveland, Ohio 44114,

ALAN M. WOLK,
628 Keith Building,
Cleveland, Ohio 44115,

EDWIN F. WOODLE,
628 Keith Building,
Cleveland, Ohio 44115,
Attorneys for Petitioner.

APPENDIX.

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION.

(Filed August 29, 1968.)

THOMAS, *J.*

The plaintiff Charlie Delia sues Court of Common Pleas of Cuyahoga County and Shaker Air Conditioning Company for a declaratory judgment to set aside a state court judgment against him. Jurisdiction of this court and the cause of action which plaintiff alleges is claimed to arise under the fourteenth amendment of the Constitution of the United States and 42 U. S. C. §§ 1981 and 1983, commonly called the Civil Rights Statutes of the United States.

The subject matter of the complaint involves case No. 756 716, litigated in the Common Pleas Court of Cuyahoga County, in which a judgment was rendered against the plaintiff and in favor of the defendant company, and later unsuccessfully appealed by the plaintiff to the Cuyahoga County Court of Appeals and the Supreme Court of Ohio. The nub of the cause of action which the plaintiff seeks to assert is set forth in paragraph 10. This reads:

> Contrary to, and in violation of, the duty imposed upon the defendant Court by the provisions of the Fourteenth Amendment to the Constitution of the United States, said Court failed and neglected to require of the defendant company proof of any and all of the elements of the cause of action which said defendant purported to present for trial and determination by the defendant Court in the above described action. In so doing, the defendant Court failed to accord to this plaintiff the equal protection of the laws of the State of Ohio, but on the contrary denied to this plaintiff the equal protection of the laws.

Defendant Common Pleas Court moves to dismiss for the reason that the complaint fails to state a claim upon which relief can be granted. Defendant company also moves to dismiss. The motion of defendant Common Pleas Court will be considered first.

The allegations of the complaint reflect, and it is not disputed, that the Common Pleas Court had jurisdiction to hear Shaker Air Conditioning Company's action against Charlie Delia and to render a money judgment against him. Dismissal is required therefore upon "the doctrine solidly established at common law," and not abolished by 42 U. S. C. §§ 1981 and 1983 (provisions of the 1871 Civil Rights Act of the United States) that a judge is immune from suit when he acts "within his jurisdiction" or "within the judicial role." *Pierson v. Ray,* 386 U. S. 547, 553-55 (1967).

Plaintiff's complaint will further be considered upon its merits. The crucial contention of the complaint, which appears in paragraph 10, charges that the defendant court "denied to this plaintiff the equal protection of the laws." To support that contention the complaint asserts only that:

> said Court failed and neglected to require of the defendant company proof of any and all of the elements of the cause of action which said defendant purported to present for trial and determination by the defendant Court in the above described action.

It is manifest that these allegations do not picture any factual claims of discrimination. Yet to constitute a denial of equal protection of laws, actionable under 42 U. S. C. § 1983, "invidious discrimination" must be charged *Lee v. Hodges,* 321 F. 2d 480 (4 cir. 1963), and the complaint "just set forth facts showing some intentional and purposeful deprivation of constitutional rights." *Powell v. Workmen's Compensation Bd.,* 327 F. 2d 131, 137 (2d

Cir. 1964). *Powell* relies on *Snowden v. Hughes,* 321 U. S. 1 (1943) for section 1983's requirement of "purposeful discrimination." Construed most favorably for the plaintiff his complaint asserts nothing more than that the Common Pleas Court "failed and neglected" to require proof. "Errors or irregularities while acting within the scope of their authority" are not sufficient to render the rulings or judgments of a court actionable under section 1983. *Sarelas v. Sheehan,* 326 F.2d 490 (7th Cir. 1963); *Bottone v. Lindsley,* 170 F.2d 705 (10th Cir.), *cert. denied,* 336 U. S. 944 (1948).

As for any allegations of the complaint which are directed at Shaker Air Conditioning Co., it is simply claimed that:

> the judgment of the defendant Court procured by the defendant company, as above set forth, in violation of the plaintiff's constitution rights is voidable and should be set aside and held for naught.

Thus as to defendant Shaker Air Conditioning Co., there is also no allegation or factual claim of "purposeful discrimination," even if it is assumed that Shaker's prosecution of its action in a state court supplies the essential element of section 1983 that the challenged conduct must be "under color of any statute * * * of any State."

The complaint failing to state a cause of action under the Civil Rights Statutes, no separate or sufficient federal jurisdiction can be asserted by plaintiff's prayer for "a declaratory judgment finding."

Accordingly, the motion of each defendant is granted. The complaint is dismissed and judgment for costs is rendered against the plaintiff.

/s/ WILLIAM K. THOMAS,
United States District Judge.

OPINION OF DISTRICT COURT ON MOTION FOR RECONSIDERATION.

(Filed October 1, 1968.)

THOMAS, *J.*

In his motion for reconsideration plaintiff cites *Village of Fairlawn v. Fuller,* 8 Ohio Misc. 266, 221 N.E. (2d) 851. There the Akron, Ohio Municipal Court quashed 37 affidavits which charged employees of a particular store with violations of a village Sunday closing ordinance. The court acted because it found "intentional discrimination" in the enforcement of the ordinance. The Municipal Court relied on *Yick Wo v. Hopkins,* 118 U.S. 356 at 373, 374, in which habeas corpus was granted Chinese laundrymen imprisoned for convictions under a San Francisco ordinance. The court found admitted discrimination based on "hostility to the race and nationality to which the petitioners belong, and which in the eye of the law is not justified."

Applying the holdings of *Village of Fairlawn, supra,* and *Yick Wo, supra,* to this court's conclusions, expressed in its memorandum granting dismissal of the complaint, plaintiff's complaint must fail because it does not assert "intentional discrimination" on the part of the defendant Court of Common Pleas. The motion for reconsideration is overruled.

/s/ WILLIAM K. THOMAS,
United States District Judge.

OPINION AND ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Filed May 2, 1969.)

Before: EDWARDS, McCREE, and COMBS, *Circuit Judges.*

The Shaker Air Conditioning Company brought an action against Charlie Delia in an Ohio common pleas court to recover on an account. Shaker obtained a judgment against Delia in the amount of $6,279.42, which was affirmed by the Court of Appeals of the Eighth Judicial District of Ohio; an appeal was dismissed by the Ohio Supreme Court.

Delia, defendant in the state court action, then filed suit in the federal district court against the Ohio court of common pleas and the Shaker Company seeking a declaratory judgment to set aside the state court judgment. Federal jurisdiction was sought to be invoked by virtue of the Civil Rights Act, 42 U.S.C. §§ 1981 and 1983, and the equal protection clause of the Fourteenth Amendment. The complaint was dismissed for failure to state a cause of action, and plaintiff appeals.

The complaint alleged that the court of common pleas "failed and neglected to require of the defendant company proof of any and all of the elements of the cause of action which said defendant purported to present for trial * * * [denying] to this plaintiff the equal protection of the laws."

Unequal application of a state law fair on its face is not a denial of equal protection unless there is shown to be present an element of intentional or purposeful discrimination. *Snowden v. Hughes,* 321 U.S. 1 (1944). Mere errors and irregularities occurring in a judicial proceeding are to be differentiated from a situation where

the proceeding itself is a sham or nullity. *Sarelas v. Sheehan,* 326 F.2d 490 (7th Cir. 1963), *cert. denied,* 377 U.S. 932 (1964). See *Bothone v. Lindsley,* 170 F.2d 705 (10th Cir. 1948), *cert. denied,* 336 U.S. 944 (1949).

If it should be assumed that the Ohio courts did not correctly apply the law of Ohio to appellant's case, there is nevertheless a lack of any allegations in the complaint tending to show a purposeful discrimination. Certainly, a construction of the equal protection clause is not favored which would in effect allow a federal court to relitigate a state court case upon every alleged departure from state law by state officers. The district court properly dismissed the complaint for failure to state a cause of action.

From an examination of the record before us it is apparent that the question upon which decision depends is so unsubstantial as not to require further argument.

The judgment of the district court is affirmed under Rule 8, Rules of the Sixth Circuit.

Entered by order of the Court:

/s/ CARL W. REUSS,
Clerk.

SUPREME COURT, U. S.

SEP 12 1969

JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

No. 394.

OCTOBER TERM, 1969.

CHARLIE DELIA,

Petitioner,

vs.

COURT OF COMMON PLEAS OF CUYAHOGA COUNTY,

and

SHAKER AIR CONDITIONING CO.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

JOHN T. CORRIGAN,

Prosecuting Attorney of Cuyahoga County, Ohio,

JOHN L. DOWLING,

Assistant Prosecuting Attorney,

Criminal Courts Building,
1560 East 21st Street,
Cleveland, Ohio 44114,

Counsel for Respondent Court of Common Pleas of Cuyahoga County.

(Other Counsel on inside of cover.)

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WOODLE, WACHTEL, BEGAM & WOLK,
EDWIN F. WOODLE,
628 Keith Building,
Cleveland, Ohio,

EMANUEL M. ROSE,
Leader Building,
Cleveland, Ohio,
Counsel for Petitioner,

JOSEPH L. NEWMAN,
809 Society National Bank Building,
Cleveland, Ohio,
Counsel for Respondent
Shaker Air Conditioning Co.

TABLE OF CONTENTS.

Issue 1

Argument 2

TABLE OF AUTHORITIES.

Cases.

Basista v. Weir (1964), U.S.D.C. W.D. Pa., 225 F. Supp. 619 4

Bottone v. Lindsley, 170 F.2d 705 (10th Circuit) (1948), certiorari denied 69 S. Ct. 810, 336 U.S. 944, 93 L. Ed. 1101 ..... 3, 4

Johnson v. Stone, (1959), Illinois, 268 F.2d 803 4

Sarelas v. Sheehan (1963), 7th Cir., 326 F.2d 490 4

Constitution and Statutes.

Constitution of the United States, 14th Amendment 2, 3, 4

28 U.S.C. 1257 3

28 U.S.C. 2101 3

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

ISSUE.

The Court of Common Pleas does not agree with Charlie Delia as to the real issues in this case. The Court of Common Pleas suggests that the issue is as follows:

Where there is no deliberate or conscious effort by a state trial court to discriminate against a litigant in such court against whom a judgment is entered, and the judgment is affirmed by an appellate court on complete review, will an independent action lie on behalf of the disappointed litigant to enable him to re-litigate the cause by the mere conclusory allegation of denial of due process and equal protection of the laws?

The Court of Common Pleas suggests that the answer to that question is negative.

ARGUMENT.

The Complaint in this case is a rather thinly disguised effort to relitigate in the federal courts a matter which has been thoroughly litigated in the state courts of Ohio and decided adversely to the plaintiff herein. It is a collateral attack on a valid judgment of the defendant Common Pleas Court which was affirmed on appeal. By invoking the civil rights statutes, Charlie Delia would have to be credited with ingenuity and originality except for the fact, as will be discussed later in this brief, that such a method has been attempted heretofore in other courts by other plaintiffs and the method has been found wanting.

In paragraph 12 of the Complaint, the plaintiff indicates, albeit rather vaguely, that he exhausted his remedies in the state court, presumably by a motion to certify to the Supreme Court of Ohio and an appeal as of right on constitutional grounds.

The Complaint implies, in paragraph one, that Charlie Delia's constitutional rights were violated, not alone by the defendant Common Pleas Court of Cuyahoga County, but also by the Court of Appeals for the Eighth Appellate District of Ohio, which is not a defendant, and by the Supreme Court of Ohio, which is not a defendant. Why are these courts omitted?

Charlie Delia would like completely to ignore the fact that the action of the Court of Common Pleas was given a full and complete review by the Eighth District Court of Appeals upon the record and upon the brief of his counsel, bringing before that court all alleged errors. If the plaintiff's rights under the Fourteenth Amendment were violated, it may well be inquired why there was no petition to the Supreme Court of the United States for a

writ of certiorari to the Supreme Court of Ohio, or a direct appeal to the Supreme Court of the United States. 28 U.S.C. 1257; 28 U.S.C. 2101.

What is especially noteworthy about the complaint is the total absence therefrom of any allegation that the defendant Court of Common Pleas had any *purpose* or *intention* or *reason* to discriminate against the plaintiff or deny him due process or equal protection of the laws.

Assuming for the sake of argument, without conceding, that the defendant court committed any error of law in deciding adversely to the plaintiff, there is a line of cases which clearly establishes that a disappointed litigant may not, simply by reason of error of law, invoke the civil rights statutes to start all over again to try to get a favorable decision from the federal courts. The leading case is *Bottone v. Lindsley,* 170 F.2d 705 (10th Circuit), decided November 5, 1948, certiorari denied 69 S. Ct. 810, 336 U.S. 944, 93 L. Ed. 1101.

In *Bottone v. Lindsley,* the court said, at page 707:

> "It is conceivable that persons, either individually or acting in concert might so use the state judicial process as to deprive a person of his property without due process of law, or of equal protection of the laws, yet we are certain that to make out a cause of action under the Civil Rights Statutes, the state court proceedings must have been a complete nullity, with a purpose to deprive a person of his property without due process of law. To hold otherwise would open the door wide to every aggrieved litigant in a state court proceedings, and set the federal courts up as an arbiter of the correctness of every state decision."

The same decision notes, with citations given therein, that the Fourteenth Amendment did not alter the basic

relations between the states and the national government, and that the Fourteenth Amendment does not assure uniformity of decisions or *immunity* from *merely erroneous action.*

The Complaint seeks to open the flood gates and sweep away the doctrine of judicial immunity. It is no excuse to say that the within action is simply a declaratory judgment action. If Charlie Delia were to prevail on declaratory judgment, the next step would be a damage action. Charle Delia's brief in this Court (p. 6) admits that the "person" who allegedly caused the deprivation of Charlie Delia's constitutional rights is a member of the defendant court and *was acting only in his capacity as a member of the court* in causing the deprivation of Delia's right.

Later decisions reaching the same result as *Bottone v. Lindsley* and citing that case with approval are: *Johnson v. Stone* (1959), Illinois, 268 F.2d 803; *Sarelas v. Sheehan* (1963), 7th Cir., 326 F.2d 490; *Basista v. Weir* (1964), U.S.D.C. W.D. Pa., 225 F. Supp. 619.

Rather than attempt to gild the lily by further argument, the appellee Court of Common Pleas respectfully refers this Court to the memorandum of the eminent district judge William K. Thomas, on the motion to dismiss the complaint and to Judge Thomas' memorandum at the time of overruling the motion for reconsideration and requests this Court to consider the same memorandums as part of our argument.

In consideration of the foregoing reasons and authorities, it is submitted that the complaint in this case fails to state facts on which relief can be granted; that the decision of the federal district court should be affirmed.

Respectfully submitted,

JOHN T. CORRIGAN,
Prosecuting Attorney of Cuyahoga County, Ohio,

By JOHN L. DOWLING,
Assistant Prosecuting Attorney,

Attorneys for Respondent
Court of Common Pleas,
Cuyahoga County, Ohio.